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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 599

LEA COUNTY ELECTRIC COOPERATIVE, INC., a corporation,
and
CENTRAL VALLEY ELECTRIC COOPERATIVE, INC., a corporation,
Petitioners.

vs.

NEW MEXICO ELECTRIC SERVICE COMPANY, a corporation, CONTINENTAL OIL COMPANY, a corporation, and PUBLIC SERVICE COMMISSION OF NEW MEXICO,
Respondents,

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW MEXICO

BRIEF FOR PETITIONERS IN REPLY TO BRIEF FOR RESPONDENT NEW MEXICO ELECTRIC SERVICE COMPANY IN OPPOSITION

OPINION BELOW

See Petition, page 1.

JURISDICTION

See Petition, pages 1-2.

QUESTION PRESENTED

See Petition, page 2.

STATEMENT

Respondent New Mexico Electric sets forth in its Statement alleged corrections to Petitioners' Statement found on pages 6-11 of their Petition. New Mexico Electric neither

quotes from the record nor makes any specific references to the record in support of its assertions, and such alleged corrections may be disregarded. In contrast, Petitioners set forth facts, supported by specific record references, establishing the denial of a federal right, which New Mexico Electric has not effectively refuted in its Brief in Opposition.

New Mexico Electric does, however, set forth certain findings of fact made by the trial court and repeated by the Supreme Court of New Mexico, accompanied by the bland statement that "The decision here as in the Supreme Court of New Mexico must rest upon these ultimate findings." Brief in Opposition, page 3.[1] No authority is cited for this proposition and such is contrary to the law.

This Court is not bound by the findings of a state court and may determine for itself the facts of a case upon which an asserted federal right depends. *Southern Pac. Co. v. State of Arizona*, 325 U.S. 761, at 771 (1945) and the cases cited in *Hoover & Allison Co. v. Evatt*, 324 U.S. 652, at 659 (1945). Whether findings of a state court are supported by substantial evidence in this case is for this Court to determine. *Truax v. Corrigan*, 257 U.S. 312, at 324 (1921). See, e.g., *Washington ex rel. Oregon R. & N. Co. v. Fairchild*, 224 U.S. 510 (1912), wherein this Court reviewed evidence before a state administrative tribunal to determine the existence of public necessity. As was stated by this Court in *Davis v. Wechsler*, 263 U.S. 22, at 24 (1923):

> "If the Constitution and laws of the United States are to be enforced, this Court cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the [federal] right or to bar the assertion of it even upon local grounds."

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[1] "Brief in Opposition" refers to Brief for Respondent New Mexico Electric Service Company in Opposition. To Petitioners' knowledge, Respondents Continental Oil Company and Public Service Commission of New Mexico have filed no brief or appearance in this matter, as could have been reasonably anticipated due to the position these two parties assumed in proceedings in the state courts of New Mexico. See Petition, footnotes 2 and 3 on page 11 and footnote 5 on page 12.

Compare, *New York Times Company v. Sullivan*, 376 U.S. 254, at 284-5 (1964).

In addition, New Mexico Electric should have drawn attention to the findings of Respondent Commission, rather than to findings made upon judicial review of the Commission's findings. Petitioners respectfully submit that the law of New Mexico is clear that ultimate review is made of the findings of the administrative agency, rather than of the district court. *S. I. C. Finance-Loans of Menaul, Inc. v. Upton*, 75 N.M. 780, 411 P. 2d 755 (1966); *Nationwide Finance Company of Chaves v. State of New Mexico Bank Examiner*, 76 N.M. 191, 413 P. 2d 471 (1966); *El Paso Natural Gas Co. v. Oil Conservation Commission*, 76 N.M. 268, 414 P. 2d 496 (1966). The Commission's findings were adverse to New Mexico Electric and appear in the record on file herein at pages 14-31.

REPLY TO POINT I OF ARGUMENT

Petitioners acknowledge the general rule that presentation of federal questions upon motion for rehearing is untimely. Until the Supreme Court of New Mexico had rendered its opinion (Petition, Appendix A), no one reasonably anticipated, however, that the Supreme Court would take a position completely inconsistent with prior decisions in this area (as shown in Petition, pages 17-30) and would, without an administrative or judicial finding that public convenience and necessity required New Mexico Electric's duplicative service or that Petitioners could not meet Continental's gradually increasing demands, overturn the Commission's order adverse to New Mexico Electric. That the federal issues were thus timely raised under such a circumstance is true even though Petitioners' motions for rehearing were summarily denied without reference to such issues. See the authorities cited in Petition, page 12, footnote 4 and, particularly, *Great Northern Ry Co. v. Sunburst Oil & R. Co.*, 287 U.S. 358, at 367 (1932) (challenge on petition for rehearing in state supreme court to constitutional validity of its decision is timely where grounds of original decision supplied new and unexpected basis for claim of denial of federal right); *Brinkerhoff-Faris Trust & Savings Co. v. Hill*,

281 U.S. 673, at 677-78 (1930) (litigant filing a petition for rehearing before state supreme court asserting denial of due process because of its decision, which petition was denied without opinion, could obtain Federal review); *State of Missouri v. Gehner*, 281 U.S. 313, at 320 (1930) (taxpayer invoking protection of Federal Constitution and statutes at first opportunity on motion for rehearing in state supreme court could have question considered); *Herndon v. State of Georgia*, 295 U.S. 441, at 444 (1935) (question respecting the validity of statute applied by lower court timely raised upon motion for rehearing "if the ruling of the state court could not have been anticipated and a petition for rehearing presented the first opportunity"); *Saunders v. Shaw*, 244 U.S. 317 (1917) (claim of denial of federal right entertained even when first made after the state court refused to consider application for rehearing).

REPLY TO POINT II OF ARGUMENT

In its Point II, New Mexico Electric, again without reference to the record and without even therein stating the issue, asserts that the unnamed issue is one of local concern only and that the judgment rests upon an adequate non-federal basis.

While your Petitioners humbly submit that the widespread affect of the decision within New Mexico and upon the 77,328 REA investor-consumers therein and its adverse affect upon REA loans therein in an amount exceeding one hundred million dollars (Petition, page 14, footnote 9) alone warrant this Court's consideration, it is untrue that the importance of the issue is limited to New Mexico. Over half the States of the Union have rural electric cooperative legislation similar to that of New Mexico[2] and at least twelve jurisdictions other than New Mexico have subjected rural electric cooperatives to regulation by a public service commission,[3] a main problem being the protection of cooperatively developed and federally assisted service areas from invasion by private utilities when

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[2] Moses, "Electrification and Telephone Programs," 30 Rocky Mountain Law Review 473, at 474 (1957-58).

[3] Brief for Respondent in Opposition, page 11, footnote 11, *The New Mexico Public Service Commission, et al v. Community Public Service Company*, October Term, 1966, No. 499.

the areas theretofore neglected by the certificated private utilities become dense enough to be financially interesting.[4] Contrary to New Mexico Electric's assertion, the judgment below has application in the East, West, North and South by directly challenging the territorial integrity of present and future REA investment, as well as affecting the tax dollars of United States taxpayers wherever situate invested in federally assisted and cooperatively supplied electricity.

To state that there is adequate non-federal basis for the action below is to beg the question, for the question is whether the action below denied Petitioners federally granted and protected rights. Whether claims are based on a federal right or are merely of local concern is a federal question upon which this Court has the final authority, and the sufficiency of the denial of an asserted federal right is for this Court alone to decide. *Angel v. Bullington*, 330 U.S. 183, at 189 (1947).

REPLY TO POINT III OF ARGUMENT

In its Point III, New Mexico Electric argues that the policies at stake are unimportant. Three substantial policies, affecting not only the Petitioners' constitutional rights, but the cooperative and private sectors of the electric service industry in New Mexico and elsewhere, federal and state public policy and the economic security of the Federal Rural Electrification Administration, are set forth in the Petition, pages 12-17, and need not be re-argued herein; it will sufficient for present purposes to merely examine New Mexico Electric's response to each stated policy.

First, New Mexico Electric dismisses public policy against restraint on competition by stating that the issue involves service to one customer and that the cooperatives are limited from serving the entire public. Only one customer—Continental—is a party, but the entire electric service industry and thousands of customers are also affected.[5] The ability of each

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[4] Moses, Ibid, footnote 2, at 478.

[5] That only small businesses are involved, or even one alone, does not detract from the applicability of policy in favor of competition. See, e.g., *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959).

of Petitioners to compete is threatened and their market entry is denied. The record further shows that servicing this "particular customer" was essential in order to extend service to and maintain and improve existing service for ranchers and farmers in the rural Maljamar area. (R. 258, 269, 271) The fact that Petitioners' service is limited by enabling legislation as to the members of the public who are not members of the cooperatives can have no possible significance, was not cited by the Supreme Court of New Mexico and, since immaterial, adds nothing whatsoever.

Second, New Mexico Electric asserts that the decision cannot affect the federally sponsored and assisted program of electrification of rural areas and that, anyway, regardless of who serves Continental, "complete new facilities must be constructed to provide the service." As has been seen, the major problem of cooperatives is now the territorial protection of their service areas from invasion and confiscation by the certificated private utility (Petition, page 15, footnote 11) and this very case illustrates the problem. The record, moreover, shows without controvention the importance of the service denied by the decision below to the promotion of electrification in the subject rural area. (R. 258, 269, 271)

Concerning the quoted factual assertion, Petitioners note that the only record reference made by New Mexico Electric is to a judicial finding attacked by Petitioners. Such assertion is true only as to New Mexico Electric. The record affirmatively shows that Continental's eventual requirement would not be reached until some 6 or 7 years following the commencement of the waterflood project (R. 598, 181) and that Petitioners individually could serve Continental's gradually increasing demands by "heavying up" existing facilities and by installing and maintaining additional facilities as the demands outgrew present facilities. (R. 230-33, 248, 366, 374)

Third, New Mexico Electric denies that Petitioners correctly stated the public policy of New Mexico against wasteful duplication, but without hinting at any alternative meaning of § 63-3-1 (B) except to again inject a new contention that Petitioners' aforesaid service limitation should somehow dissipate

the clear legislative statement of public policy. The service limitation has no relevancy to the applicability of the policy against duplicative facilities, and was not cited by the courts below. The statement that such public policy, whatever New Mexico Electric contends it to be, is not applicable in the case at bar, begs the question raised by the Petition herein. The assertion that Petitioners' right to extend their lines was not affected by the decision is ludicrous, in view of the fact that the decision allowed New Mexico Electric to pirate away the customer to whom the lines had and would continue to be extended.

REPLY TO POINT IV OF ARGUMENT

A. As has been stated, New Mexico Electric's assertion that in order for Petitioners to serve Continental completely new facilities would be required, is not supported by the record. It is true, however, that New Mexico Electric had no existing facilities within the area by which it could serve all or any part of Continental's requirements and its closest line was 14¾ miles distant and inadequate to serve the total requirements. (R. 538-39)

1. New Mexico Electric neither denies that Petitioners were first in the area nor the authority contained in Petition, pages 18-19, that Petitioners were thus entitled to protection against unreasonable interference. New Mexico Electric merely asserts that even though Petitioners were operating, it acquired superior rights by virtue of an *area* certificate subsequently granted and the cooperatives should have been careful not to provide service within an area covered by such certificate, though not actually served by New Mexico Electric. Such contention is without merit without stating the corollary that rural residents of the area should be doomed to darkness until New Mexico Electric deemed fit to provide service under its *area* certificate. Additionally, New Mexico Electric can place no reliance upon § 68-7-1.1(B), for that grandfather clause only recognized New Mexico Electric's *area* certificate, if at all, if it were "exercised within the time required under section 68-7-2" and in such event, then "both utilities shall be permitted to continue service." (Petition, page

4) New Mexico Electric's certificate in the Maljamar area had not been exercised within the time required by § 68-7-2 and, in any event, New Mexico Electric had no existing service with which it could "continue."

2. New Mexico Electric's answer to Petitioners' subpoint that its *area* certificate was null and void for non-user consists only of a re-statement of the position assumed by the state courts. Such re-statement avoids the question of whether the position was so arbitrary and unreasonable as to deny Petitioners their constitutional rights.

3. New Mexico Electric's answer to Petitioners' contention that the granting of an *area* certificate is not authorized by law is that the record shows *area* certification has been the consistent practice of the Commission and that such practice of the Commission was approved by the Supreme Court of New Mexico in *Edington v. New Mexico Public Service Commission*, 74 N.M. 647, 397 P. 2d 300 (1964) and not disapproved by *Lea County Electric Co-op v. New Mexico Public Service Commission*, 75 N.M. 191, 402 P. 2d 377 (1965). New Mexico Electric does not, however, cite where the record shows a consistent practice of granting *area* certification, and Petitioners are informed and believe that relatively few *area* certificates have ever been issued as compared to the many non-area certificates issued to various utilities under § 68-7-1. The *Edington* case, if it did involve one of these rare *area* certificates, did not involve or resolve any issue whether *area* certification was permitted by law. The *Lea County* case held just what Petitioners have contended (Petition, page 23), i.e. utilities, including Petitioners, coming under the Public Utility Act by virtue of the 1961 amendment could not obtain *area* certification but only certification limited to *plant, line and system.*

4. In answer to Petitioners' contention that the Commission had the independent power and duty to prevent unreasonable interference, New Mexico Electric answers only that a subsequent holding of the Supreme Court of New Mexico has mooted the argument and, anyway, the attack is against the construction of a state statute by a state court of last re-

sort. *Community Public Service Company v. New Mexico Public Service Commission*, 76 N. M....., 414 P. 2d 675 (1966), cited as mooting the argument, has been stayed by a member of the Supreme Court of New Mexico pursuant to 28 U.S.C., § 2101(f) pending action by this Court in *The New Mexico Public Service Commission, et al v. Community Public Service Company*, October Term, 1966, Docket No. 499. New Mexico Electric's second assertion does not answer the question whether the decision was arbitrary and unreasonable in violation of the 14th Amendment. In addition, in *Coombes v. Getz*, 285 U.S. 434, at 441 (1932), this Court held:

> "The decision of the Supreme Court of a state construing and applying its own Constitution and laws generally is binding upon this court; but that is not so where the contract clause of the Federal Constitution is involved. In that case this court will give careful and respectful consideration and all due weight to the adjudication of the state court, but will determine independently thereof whether there be a contract, the obligation of which is within the protection of the contract clause, and whether that obligation has been impaired; and, likewise, will determine for itself the meaning and application of state constitutional or statutory provisions said to create the contract or by which it is asserted an impairment has been effected. Scott v. McNeal, 154 U.S. 34, 45 S. Ct. 1108, 38 L. Ed. 896; Mobile & Ohio Railroad v. Tennessee, 153 U.S. 486, 492, etc., 14 S. Ct. 968, 38 L. Ed. 793; Stearns v. Minnesota, 179 U.S. 223, 232, 233, 21 S. Ct. 73, 45 L. Ed. 162; Louisiana Ry. & Nav. Co. v. New Orleans, 235 U.S. 164, 170, 35 S. Ct. 62, 59 L. Ed. 175; Huntington v. Attrill, 146 U.S. 657, 684, 13 S. Ct. 224, 36 L. Ed. 1123; N. O. Waterworks v. La. Sugar Co., 125 U.S. 18, 38, 8 S. Ct. 741, 31 L. Ed. 607; Bridge Proprietors v. Hoboken Co., 1 Wall. 116, 144, 17 L. Ed. 571; Jefferson Branch Bank v. Skelly, 1 Black, 436, 443, 17 L. Ed. 173."

See also, *Detroit United Railway v. Michigan*, 242 U.S. 238 (1916); *Appleby v. City of New York*, 271 U.S. 364 (1926);

Irving Trust Co. v. Day, 314 U.S. 556 (1942); *Arkansas Southern R. Co. v. Louisiana & Ark. R. Co.*, 218 U.S. 431 (1910).

B. New Mexico Electric dismisses the impairment of Petitioners' franchise right by arguing that (1) concerning the franchise right under the Rural Electric Cooperative Act, Petitioners must be deemed to have accepted the franchise subject to the ten per cent non-member service limitation and (2) concerning the franchise right under § 68-7-1.1(A), service must be discontinued by virtue of "the nature of the service" rather than due to the decision below. Under either argument, New Mexico Electric admits the existence of franchise rights subject to this Court's protection under Article I, § 10.

For present purposes, Petitioners do not contest that they received their franchise under the New Mexico Rural Electric Cooperative Act subject to the service limitation of § 45-4-3(d). Such service limitation was not mentioned by the Supreme Court of New Mexico in its opinion and has no relevancy whatsoever concerning destruction of Petitioners' enfranchised rights to serve Continental.

As to service under their public convenience certificates, Petitioners, contrary to New Mexico Electric's assertion, could have served Continental upon their existing lines until Continental's gradually increasing load reached the point where additional facilities had to be added and at such point Petitioners could have served the peak demand of Continental at less cost than New Mexico Electric, which required the immediate construction of entirely new facilities to even render one kilowat of service to Continental. What prevents the exercise of such rights is irrefutably the absence of the customer, which was pirated away by New Mexico Electric, which action was upheld by the court below.

REPLY TO POINT V OF ARGUMENT

In answer to Petitioners' Point III that they were denied equal protection of the law, New Mexico Electric asserts that Petitioners and New Mexico Electric were not on equal status by reason of Petitioners' service limitation, Petitioners lost no

right and Petitioners and New Mexico Electric were treated equally.

New Mexico Electric's assertion that the service limitation justified unequal treatment is without foundation in law or in fact.[6] In the opinions below, the New Mexico courts did not base their decisions upon the service limitation, or even mention the same. The New Mexico courts therein assumed that New Mexico Electric and Petitioners performed similar services, were all classified as publlic utilities under the jurisdiction of the Commission and all held certificates of public convenience and necessity granted by the Commission. In the record before this Court no basis for discriminating treatment under the Public Utility Act exists or was assumed.[7]

The assertion that Petitioners lost no right and the parties were treated equally is totally unpersuasive in view of the fact that while Petitioners were denied *area* certification by virtue of *Lea County Electric Coop v. New Mexico Public Serv. Com'n*, 75 N.M. 191, 402 P. 2d 377 (1965), the opinion below upheld New Mexico Electric's *area* certification and based upon such *area* certification, and no administrative or judicial finding of public convenience and necessity, held that the Commission had no jurisdiction to prevent New Mexico Electric's proposed entirely new system from unreasonably interfering with Petitioners' existing plant, line and system serving Continental. By reason thereof, one cannot but conclude that the judgment and opinion of the Supreme Court of New Mexico, and

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[6] There is no evidence in the record that any member of the general public was ever refused service by the Petitioners and § 45-4-3(d) allows service of the general public, or class thereof, to the extent that such member is also a member of the cooperative or is a non-member but within a figure of ten per cent of the number of the cooperative's members.

[7] New Mexico Electric, at pages 13-14 of its Brief in Opposition, states that Petitioners are not required to obtain Commission approval for extensions into adjacent territory. § 68-7-1 provides, however, only for extensions into territory contiguous to that already occupied by it and not receiving similar service from another utility, which would require Commission approval of any extension by Petitioners within a part of New Mexico Electric's certificated area actually served by it.

the franchise sections of the Public Utility Act as interpreted thereby, invidiously discriminate against Petitioners.

CONCLUSION

For the reasons stated in the Petition and hereinabove, it is respectfully submitted that in the exercise of this Court's sound judicial discretion, review on writ of certiorari should be granted.

Respectfully submitted,

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